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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1079

NORMAN BRONIMAN,
Petitioner,

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a foreign corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Norman Broniman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on December 10, 1965.

OPINIONS BELOW

The judgment of the district court (9a-12a, record below) granting respondent's motion for summary judgment is unreported. The opinion of the Court of Appeals is reported in 353 F.2d 559, 1966, and a copy is appended hereto (Appendix A, 1a).

JURISDICTION

The judgment of the Court of Appeals is dated December 10, 1965 and was entered on the same date. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I. Where an employee, whose rights under a collective bargaining agreement have been breached, attempts use of the contract grievance procedure to obtain redress but is frustrated by the inaction of the union and rebuffed by the employer, does the doctrine of Republic Steel Corp. v. Maddox, 379 U.S. 650, require the employee to take further steps in the grievance procedure as a condition precedent to commencement of an action at law against the employer?

II. Where an employer admittedly refuses to participate in the use of the first step of a grievance procedure, and the employee institutes a court action to recover damages for breach of his rights under the collective bargaining agreement, has the employer waived the defense of failure to resort to the grievance procedure as a condition precedent to suit?

III. May an employee obtain injunctive relief to compel a union and an employer to submit a grievance to arbitration where the contract provides for arbitration?

STATUTES INVOLVED

Labor-Management Relations Act of 1947, as amended:

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

activities for the purpose of collective bargaining or other mutual aid or protection . . .

* * *

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." 61 Stat. 140, 143, 29 U.S.C.A. 157, 159(a), Title I, Sec. 101.

STATEMENT

The respondent did not answer the amended complaint and, therefore, the facts therein pleaded stand admitted. They are:

That the court has jurisdiction by reason of diversity of citizenship and also under the provisions of 29 U.S.C.A. Sec. 159(a) and 29 U.S.C.A. Sec. 185, being 61 Stat, 156, et seq. That petitioner was employed by the respondent from May, 1953 until April, 1961 and, during the period of said employment, was covered by a collective bargaining agreement under and by virtue of the terms of which he acquired the right to be employed in accordance with his seniority and the right not to be discharged without just cause arising out of failure to discharge his duties as an employee. He was entitled to receive two written warning notices before being discharged and a written notice of discharge from the respondent. He was entitled to have

any grievance relating to his employment relationship processed through a contractual grievance procedure which included arbitration (2a-3a, record below). He was first informed, around April, 1961, that he was being laid off for lack of business and, learning that persons with less seniority than he had were still employed, he filed a written grievance with a union steward protesting this violation of his seniority rights. The union took no action on this grievance (3a-4a, record below). At the same time petitioner made numerous attempts to present his grievance to respondent company but the respondent refused to discuss his grievance with petitioner (4a, record below).

Around August, 1961, petitioner was informed that the respondent company asserted it had discharged him as of May 22, 1961. He did not receive any written notice to this effect at any time nor had he received two written warnings prior to the alleged discharge. Upon learning of the respondent company's claim that he had been discharged, petitioner attempted to present a grievance over said discharge to respondent company for the purpose of having it adjusted, as provided by 29 U.S.C.A. Sec. 159(a), but respondent ignored these efforts on the part of the petitioner (4a, record below).

Petitioner filed his complaint asking:

(a) That the respondent employer be ordered to meet with him for the purpose of processing his grievance;

or, in the alternative,

(b) For damages and general relief.

The trial court granted a motion for summary judgment, which had been filed by respondent (8a-9a, record below). The order granting the motion for summary judgment was entered on June 17, 1964 (9a-12a, record below). The Court of Appeals for the Sixth Circuit affirmed.

The pertinent provisions of the collective bargaining agreement, on which the court based its decision, are cited in the memorandum opinion (10a, record below).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has decided a federal question in conflict with the applicable decisions of this court.

ARGUMENT

I. The Court of Appeals has decided a federal question in conflict with the applicable decisions of this court.

A. The specific cases upon which petitioner bases its claim that the Court of Appeals for the Sixth Circuit has decided a federal question in conflict with the applicable decisions of this court are Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, and Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614.

In the first of these cases, this court affirmed the right of individuals to resort to court to enforce rights accruing to them under the terms of a collective bargaining agreement; and, in the second case this court held that as a condition precedent to such an action an employee must *attempt* use of the contract grievance procedure agreed upon by the employer and the union as the mode of redress. The reasons given for imposing this condition precedent were that:

(1) it enhances the prestige of the union as collective bargaining agent;

(2) it gives the employer notice of the existence of the grievance and an opportunity to adjust it through the chosen channels;

and

(3) it gives effect to the Congressional policy favoring the use of grievance-arbitration procedures as a means of promoting industrial peace.

At no point in its decision did the court suggest that the imposition of such a condition precedent in any way benefited the individual employee but, rather, it is clear that

it is a burden laid on the employee for the benefit of the employer and the union and the implementation of public policy. *The question raised by this petition is whether the burden laid on the employee is to be made as light as is consistent with the objectives to be achieved or as onerous as possible so as to discourage or preclude the institution of actions by individuals to enforce their rights under collective bargaining agreements.*

The contract grievance procedure set forth in the collective bargaining agreement herein involved is as follows:

> "Any complaint of violation or infraction of any section of this Agreement shall first be submitted for settlement or arbitration to the Steward of the Union or the Employer on the premises, who shall endeavor to settle the same satisfactorily to both parties. Should he, however, be unable to settle the same, then such complaint shall be submitted to the Business Agent of the Local Union #337, who shall endeavor to settle the same satisfactorily to both parties. Should he, however, be unable to settle the same satisfactorily, then such complaint shall be settled by a Board of Arbitration. . . ."

It is admitted, and the Court of Appeals found, that at the time of the initial layoff in April, 1961, the petitioner filed a written grievance with his union steward, who did nothing about it; and also tried to discuss the matter with the employer, who refused to listen. Upon learning, in August, 1961, that he had been discharged as of May 22, 1961, petitioner sent a written notice of his grievance over the discharge to his employer in an attempt to initiate a discussion with the employer, and a copy of this notice was sent to the union to permit them to be present at any such discussion as required by the proviso to 29 U.S.C.A. Sec. 159(a), all as shown by paragraphs 13 and 14 of the amended complaint. There was no response to this letter. Even if petitioner had not complied with the requirements of the proviso of Sec. 159(a), there is no reason why the employer could not have notified the union of its intention

to discuss the grievance, thereby giving the union an opportunity to be present.

Nonetheless, after all of the foregoing, the Court of Appeals for the Sixth Circuit held that the petitioner had not attempted to use the contract grievance procedure agreed upon by the employer and the union. The result is that the *employer* is permitted "to completely sidestep available grievance procedures" and then claim immunity from a lawsuit on the ground of non-exhaustion of the grievance procedure. We can find nothing in either the language used by this court nor the rationale of *Republic Steel* to sustain such a decision.

The Court of Appeals bases its conclusion that there was no "real" attempt, on the part of petitioner, to use the contract grievance procedure on two grounds — both of which seem erroneous to petitioner. The first is that the grievance procedure provides "if neither the employer nor the steward is able to settle the grievance, the complaint shall then be submitted to the Business Agent of the Local Union". The Court of Appeals assumes that it is the employee's duty to submit the grievance to the business agent. The contract is ambiguous at best and, since the grievance procedure provisions are inserted by the company and the union for their benefit, ought to be construed against them. We believe from a careful reading of the provision that it is the steward who is to submit an employee grievance to the business agent if he is unable to settle it. The alternative possibility is that if the employee takes his grievance up directly with the employer and the employer is unable to settle it, then the employer is the one who is to submit it to the business agent. These conclusions flow from the words of the contract to the effect that either the steward or the employer is to settle the grievance and it is the person who is unable to settle the grievance who is to submit it to the business agent.

Regardless of the foregoing, however, resort to the second step is available only if the employer or union steward is unable to settle the grievance at the first level. This leads us directly to the second ground upon which the Court of Appeals bases its decision — namely, that "the alleged

failure of the union steward or defendant to take any action on plaintiff's complaint'' must be considered as an inability to adjust or settle the grievance. Inasmuch as it is admitted that this petitioner was wrongfully laid off, wrongfully discharged, deprived of the protection of warning notices and written notice of discharge accorded to him by the contract, and no justification for any of these actions has been advanced, the refusal of the employer to even discuss the matter with petitioner can only be classified as arbitrary. By what semantic alchemy does the arbitrary refusal of the employer to entertain a grievance by the employee become transmuted into a good faith inability to adjust or settle the grievance?

The problems pertaining to the enforcement of the rights of individuals under collective bargaining agreements comprise one of the more sensitive and pressing areas in the field of labor law presently. If this decision by the Court of Appeals for the Sixth Circuit is permitted to stand as definitive law, then every factory worker is faced with trying to steer the perilous course between the Scylla of not doing enough by way of an attempt to use the contract grievance procedure and the Charybdis of seeking to do too much by way thereof, i.e. seeking to compel arbitration. Considering the objective which is sought to be achieved on the one hand and the probable educational background of most workers with grievances on the other, we urge that the court ought to grant certiorari for the purpose of making it clear that any conduct on the part of an employee which gives a union and an employer notice of his grievance and an opportunity to act on it through the grievance procedure satisfies the requirement of an attempt to use the contract grievance procedure as a condition precedent to suit.

B. The conduct of the respondent itself ought to be held to preclude it from raising the defense of failure to resort to the contract remedy as a condition precedent to suit.

When petitioner first attempted to discuss his grievance with the employer, pursuant to the express provisions of

the contract grievance procedure, the employer affirmatively refused to talk with him; when he sent a written notice of his grievance at the time of learning of his alleged discharge, the employer consciously omitted to make any reply whatsoever to the letter; and, finally, when suit was commenced, the employer failed to move either for dismissal, or for summary judgment, until well over two years later. In the interim there had been three pre-trial conferences and the case had been scheduled for trial on four different dates. On three occasions the trial had been adjourned by the court but it was not until it appeared that the case was actually going to be tried that the respondent brought its motion for summary judgment.

It has been well said that a party may not rely on its own wrongful act to defeat a remedy. *Dietrick v. Greaney*, 60 S. Ct. 480, 309 U.S. 190, 196. And it has also been said:

> "'Implied waiver' results from party's pursuance of such course of conduct toward another as evidences intention to waive right, or conduct inconsistent with any other honest intention, thereby inducing other to act on belief that right has been waived and to incur trouble and expense." *Universal Gas Co. v. Central Illinois Public Service Co., et al.*, 102 F.2d 164, 168, C.A. 7, 1939, Headnote 9.

It is difficult to see how anyone could conclude that the respondent had any honest intention of submitting this grievance to the grievance procedure; if it had, it would have participated in the first step thereof at the petitioner's request. Further, if effectuating the Congressional policy of encouraging the settlement of industrial disputes by means of contractual grievance-arbitration procedures is important, it would seem to be just as wrongful for the employer to close the door to the use of such procedures as it would be for an employee to fail to attempt to open it. Surely all of the responsibility is not to be laid on the individual employee to the complete exculpation of the employer and union.

If the respondent had in good faith wanted to have this grievance processed through the grievance procedure,

it could easily have moved promptly for a stay of proceeding pending arbitration, made a good faith effort to settle the grievance with petitioner at the first step of the grievance procedure, in the presence of the union as required by 29 U.S.C.A. Sec. 159 (a) and if honestly unable to adjust it at that point, could have proceeded to submit it for settlement to the business agent. *James B. Carey and International Union v. Carter*, C.A.D.C., 1965, 344 F.2d 568; *Local Lodge No. 595 v. Howe Sound Co., Inc.*, C.A. 3, 1965, 350 F.2d 508, 511.

Petitioner's position is that the entire course of conduct of respondent herein indicates an intention to repudiate the agreement to settle this grievance by means of the contract grievance procedure, which it has the right to do if it so desires. *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 262, 82 S. Ct. 1346, 8 L. Ed. 2d 474.

C. The Court of Appeals devotes the first five pages of its opinion to considering whether an individual employee may sue to compel arbitration of his grievance in accordance with the provisions of the contractual grievance-arbitration procedure and concludes that he may not.

In reaching this conclusion, the Court of Appeals relies largely on *Black-Clawson, Inc. v. International Association of Machinists*, 313 F.2d 179, C.A. 2, 1962. The Complaint in the instant cause was filed on March 19, 1962; Black-Clawson was decided December 22, 1962. So far as appears there were no Court of Appeals decisions on this issue prior to the time this cause was filed. Petitioner concedes that it may now be taken as law in the Second Circuit and the Sixth Circuit that an individual may not compel arbitration of his grievance in accordance with the provisions of the grievance-arbitration clauses; but at the time of filing the Complaint, a request for relief in the alternative was appropriate both from the standpoint of prudent pleading and to anticipate a defense of non-exhaustion of the contractual grievance procedure.

There was at least some precedent for this approach. On August 25, 1961, the District Court for the Eastern

District of Michigan, Judge Thornton presiding, had issued an injunction ordering a union to assert and enforce the grievances of a group of employees who alleged that their contractual rights had been violated in connection with the closing of one plant and the consequent transfer of employees by the company. *Pekar v. Local Union No. 3, et al.*, D.C. Mich. 195 F. Supp. 938, reversed 311 F.2d 628, cert. denied 83 S. Ct. 1303, 373 U.S. 912. In *Donnelly v. United Fruit Co.*, 190 A.2d 825, the New Jersey court decided that employees should have the right to carry their grievances all the way through the contractual grievance procedure, including arbitration, and specified how it felt the practical problems arising out of such a decision could be made. That the question has by no means been finally decided is clear from the attention that it is receiving by lawyers concerned with problems of labor law. See American Bar Association Section of Labor Relations Law, 1965 Proceedings, Report of the Committee on Labor Arbitration and the Law of Collective Bargaining Agreements, page 256 et seq.

It would seem clear, however, that when a company or a union raises the defense of failure to resort to, or exhaust, the contractual grievance procedure as a condition precedent to suit by an individual employee, the only appropriate response is to order a stay of proceedings pending arbitration or strike the defense and proceed with the lawsuit. In this way the defendant receives the benefit of the procedure for which it bargained, *if this is what it really wants,* and dispels a sham issue if that is what is offered. A decision as to which response should be made to the defense should be within the sound discretion of the trial court and would undoubtedly depend upon such factors as the means chosen by the defendant to raise the objection, its response to an offer to stay proceedings pending arbitration and the nature of the grievance. Where, as in *Pekar v. Local Union No. 3, et al.*, supra, two groups of employees are involved, it well may be that the only way to assure fair consideration of all conflicting claims is by a reference to the arbitration provided by the contract.

The Court of Appeals for the Second Circuit, in *Black-Clawson*, supra, predicated its decision on a claim that chaos would result if individual employees were permitted to invoke arbitration. The court would find it extremely difficult to support this assertion by way of empirical evidence and it wholly ignores the alternative which is enforcement of individual rights through the courts. It is at least debatable whether it would be any more chaotic to have grievances decided by the method established in the contract at the instance of the individual employee than it would be to have courts deciding the same issues.

In any event, opposed to this consideration is the *right* of the individual employee to have his grievances determined by a labor arbitrator. The cases are strangely silent about this, but are not the rights of the individual in the collective bargaining agreement at least co-equal with those of the union and the employer? It is impossible to believe that any labor arbitrator would have upheld the termination of Norman Broniman's employment in the absence of the two written warning notices and a written notice of discharge.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DEE EDWARDS,
Attorney for Petitioner.

Dated: March 2, 1966.

APPENDIX A

No. 16081

OPINION OF THE COURT OF APPEALS

Decided December 10, 1965.

Before: O'SULLIVAN and PHILLIPS, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. This cause is on appeal from an order of the United States District Court for the Eastern District of Michigan, Southern Division, granting summary judgment to The Great Atlantic & Pacific Tea Company, defendant-appellee. The case was submitted to the court on the amended complaint of Norman Broniman, plaintiff-appellant, and the affidavit of John H. Main, operating superintendent of defendant-appellee, with attached copy of the collective bargaining agreement between the defendant-appellee and the union representing the appellee's employees.

The plaintiff-appellant was an employee of the defendant-appellee and admittedly one of the employees covered by the collective bargaining agreement above mentioned. The parties will be referred to as plaintiff and defendant, respectively. Jurisdiction is based on diversity of citizenship

(Section 1332(a), Title 28, U.S.C.) and Sections 159(a) and 185, Title 29, U.S.C. (Sections 9(a) and 301 LMRA.)

We are bound to accept as true the allegations of the amended complaint, the pertinent facts of which are as follows: The plaintiff was employed as a selector in the warehouse of the defendant from sometime in May, 1953, until on or about April 14, 1961. Under and by virtue of the collective bargaining agreement between the defendant and the union, the plaintiff acquired certain rights for con-

tinuity of employment and the right not to be laid off out of seniority or to be discharged without just cause. He was entitled to have written notice of discharge and to have such written notice preceded by two written warning notices. Plaintiff further acquired the right to have any grievances arising out of his employment or any grievances arising out of the circumstances of a discharge processed through the grievance procedure provided in the agreement.

On April 14, 1961, plaintiff was laid off because of an alleged falling off of business. The defendant continued in its employ, subsequent to plaintiff's layoff, other employees with less seniority than that of the plaintiff, in violation of the plaintiff's rights under the agreement.

The plaintiff filed a written grievance with Harry Whipple, a union steward, on May 11, 1961. Plaintiff alleges upon belief that the union steward took no action on his grievance in violation of the steward's union duty. On August 7, 1961, plaintiff was informed that he had been discharged as of May 22, 1961. Plaintiff was not given two warning notices in writing and was not given a written notice of discharge by the defendant.

At the time of the layoff plaintiff made numerous attempts to present his grievance to the defendant but the defendant refused to discuss the grievance with the plaintiff or with his collective bargaining representative. On August 15, 1961, plaintiff had his attorney send a written notice of his grievance to the defendant. The defendant failed, refused and neglected to reply to this notice of grievance.

It is alleged upon the above stated facts that the defendant's refusal to permit plaintiff to present his grievance and have it adjusted is a breach of plaintiff's rights under the provisions of Section 159(a), Title 29, U.S.C. Plaintiff further alleges a breach of the contract of employment as modified by the collective bargaining agreement and claims money damages in a substantial amount for loss of earnings and pension and welfare rights.

For relief the plaintiff seeks an order of the court requiring the defendant to meet with the plaintiff for the purpose of processing his grievance arising out of his wrongful discharge, as provided by Section 159(a), Title 29, U.S.C. And further, the plaintiff seeks damages in the amount of $25000, plus loss of wages to the date of trial.

Whatever rights the plaintiff possessed as to seniority and as to any limitation upon the defendant's right to discharge him must find their source in the collective bargaining agreement between the defendant and the union representing the defendant's employees. *Union News Co. v. Hildreth,* 295 F.2d 658, 663, C.A. 6; *Elder v. New York Cent. R. Co.,* 152 F.2d 361, C.A. 6; *United States Steel Corporation v. Nichols,* 229 F.2d 396, 399, C.A. 6, cert. den. 351 U.S. 950. The collective bargaining agreement in question provides for a grievance procedure.[1]

Substantive federal law is controlling in actions on collective bargaining agreements. *Textile Workers v. Lincoln Mills,* 351 U.S. 448; *Local 174, Teamsters Union v. Lucas*

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1 "ARTICLE III — GRIEVANCE PROCEDURE

Section 1. Any complaint of violation or infraction of any section of this Agreement shall first be submitted for settlement or arbitration to the Steward of the Union or the Employer on the premises, who shall endeavor to settle the same satisfactorily to both parties. Should he, however, be unable to settle the same, then such complaint shall be submitted to the Business Agent of the Local Union No. 337, who shall endeavor to settle the same satisfactorily to both parties. Should he, however, be unable to settle the same satisfactorily, then such complaint shall be settled by a Board of Arbitration composed of the following: Two (2) to be selected by the Employer, the Steward of the Union, and the Business Representative of the Local Union. In case of a disagreement, a fifth member shall be chosen by the Arbitration Board, whose majority decision shall be binding upon both parties."

Flour Co., 369 U.S. 95; *Smith v. Evening News Association,* 371 U.S. 195, 199; *General Electric Co. v. Local* 205, 353 U.S. 547.

The right of an individual employee to bring an action, by virtue of Section 301 LMRA, against his employer for violation of rights arising out of a collective bargaining agreement cannot now be questioned. *Smith v. Evening News Association, supra; Humphrey v. Moore,* 375 U.S.

335; *Carey v. Westinghouse Electric,* 375 U.S. 261, 268. However, the right to bring such an action is not an unlimited one.

The question now before us is whether the plaintiff under the collective bargaining agreement, to which he was a beneficiary, and under the facts of this case as alleged in the amended complaint, was in a position to bring a direct action against his employer. We conclude that he was not.

The action is brought as a violation of the plaintiff's rights under Section 159(a), of Title 29, U.S.C.[2] The plaintiff seeks an order requiring the defendant to meet with the plaintiff for the purpose of processing his grievance. The nature of the action herein and the relief sought are based on a misconception of the statute in question. The employer is not required to meet for the purpose of adjusting a grievance. The statute provides a permissible step in adjustment, not a required one. In other words, this section of the statute grants a privilege to the employee. He may or may not take his grievance directly to the employer, as he chooses. If he takes his grievance directly to the employer, the employer may not wish to attempt to make an adjustment in the absence of the union representative and he cannot be compelled to do so. There could be good reason for this.

---

2 "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

The cases cited by counsel for plaintiff are not in point. In *Hughes Tool Co. v. National Labor Relations Board,* 147 F.2d 69, 73, C.A. 5, the court held that the union or its representative did not have the *exclusive* right to handle the employee's grievance. Section 159(a) preserved the *right* to the employee to approach the employer individually.

United Protective Workers of America v. Ford Motor Co., 194 F.2d 997, was an action by the union and the employee. The employer refused to follow the grievance procedure at the request of the union. *National Labor Relations Board v. North American Aviation, Inc.*, 136 F.2d 898, C.A. 9, involves a charge by the union that the employer committed an unfair labor practice by offering the employees a method of settling labor disputes through the company, that ended in arbitration and paralleled the method provided in the collective bargaining agreement. The court held that the employer had a right to do this under the proviso of Section 159(a) which gives the right to employees to present their grievances to their employer. It was not mandatory that the employees follow the employer's plan. They could choose to follow the procedure set up in the collective bargaining agreement. *Elgin, Joliet & Eastern Railway Co. v. Burley et al.*, 325 U.S. 711, rehearing granted 326 U.S. 801, opinion on rehearing 327 U.S. 661, involves the Railway Labor Act. The court held that a collective bargaining representative is without statutory authority under the Railway Labor Act to compromise and settle a monetary claim of an individual employee. A settlement so effected in the absence of legally sufficient authorization will not bar a suit by the individual employee to enforce his claim.

We agree with the construction placed upon Section 159 (a) by the Second Circuit in *Black-Clawson Co., Inc. v. International Ass'n of Mach.*, 313 F.2d 179. The court said at p. 185:

> "It seems clear, therefore, that rather than conferring an indefeasible right upon the individual employee

> to compel compliance with the grievance procedure up to and including any arbitration provision, section 9(a) merely set up a buffer between the employee and his union, 'permitting' the employee to take his grievances to the employer, and 'authorizing' the employer to hear and adjust them without running afoul of the 'exclusive bargaining representative' language of the operative portion of section 9(a)."

It is clear to us that the plaintiff is not entitled to the order prayed for in his petition as a result of the violation of his rights under Section 159(a).

There is another potent reason that bars the plaintiff's action against the defendant. It is alleged in the amended complaint that the plaintiff filed a written grievance with a union stewart and that he made numerous attempts to present his grievance to the defendant, including a written notice to defendant by his attorney. This was only the first step of the grievance procedure provided in the collective bargaining agreement. According to the agreement, if neither the employer nor the stewart is able to settle the grievance, the complaint shall then be submitted to the business Agent of the Local Union. The alleged failure of the union stewart or defendant to take any action on plaintiff's complaint must be considered as an inability to adjust or settle the grievance.

It is not alleged in the amended complaint that the plaintiff took this second step. This was a simple and easy step which the plaintiff could have taken himself without any assistance. The plaintiff having failed to follow the simple procedure of the agreement by submitting his complaint to the Business Agent of the Local Union, he is not in a position to bring an action against the defendant.

Republic Steel Corporation v. Maddox, 379 U.S. 650, decided after the briefs were filed on this appeal is dispositive of the issue now before us upon the use of the grievance procedure in the collective bargaining agreement. At p. 652 the Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress."

It is clear in the case before us that there was no real attempt to use the contract grievance procedure agreed upon by the employer and the union. At p. 653 the Court said:

> "And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements,' *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103."

We conclude that under the facts of this case the district judge was correct in granting a summary judgment to the defendant.

Judgment affirmed.